**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SECOND APPEAL NO. 174 OF 1984**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE R.S.GARG**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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**HUSAINBHAI HAJIBHAI - Appellant(s)**
**Versus**
**WIDOW JENANBAI ALIBHAI - Respondent(s)**

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**Appearance :**
MR. J.R. NANAVATI, SR. COUNSEL for Appellant(s).
MR. SURESH M. SHAH for Respondent(s).

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**CORAM : HONOURABLE MR.JUSTICE R.S.GARG**

**Date : 25/07/2006**

**ORAL JUDGMENT**

Mr.J.R.Nanavati, learned Senior Counsel for the appellant, and Mr.S.M.Shah, learned Counsel for the respondents, are heard.

2. The present appeal has been admitted for hearing on the following substantial question of law :

> *"Whether in the facts and circumstances of the case, the lower court was right in interpreting and construing the order of remand made by this Honourable Court in Second Appeal No.202 of 1981 dated 22nd February, 1983?"*

Probably, the appellant wants to contend that on the facts and in the circumstances of the case, the learned first Appellate Court was unjustified in wrongly interpreting the order of remand by holding that the finding of the High Court relating to insufficiency of the evidence would bind it.

3. The facts necessary for disposal of the present appeal are that the appellant-plaintiff filed a suit submitting, *inter alia*, that the possession of the property in dispute be handed over to the plaintiff as he had purchased the property in the Court auction. The trial Court, so also the first Appellate Court, dismissed the suit, the High Court remanded the matter back to the trial Court for trial afresh. Thereafter, the trial Court dismissed the suit, but, the first Appellate Court

decreed the suit and at the instance of the defendant, Second Appeal No.202 of 1981 came to be filed, which was decided on 22nd February, 1983. The High Court observed that the evidence available on the record was not sufficient to grant a decree in favour of the plaintiff, but, the High Court recorded its opinion that the matter deserves remand. The High Court, accordingly, remanded the matter to the learned first Appellate Court with a direction that the records of auction be called for from the Office of the Collector, both the parties be allowed to lead evidence and the trial Court should thereafter decide the matter. After remand by the High Court, the matter was placed before the learned first Appellate Court; the learned first Appellate Court called for the records from the Office of the Collector and required the parties to lead evidence. The parties, however, submitted their applications that they did not wish to lead any further evidence. The matter was thereafter heard. The learned first Appellate Court, after hearing the parties, came to the conclusion that in view of the findings recorded by the High Court that the evidence was insufficient to grant a decree and after taking note of the fact that despite order of remand, the plaintiff was not ready and willing to produce any further evidence, dismissed the suit. Being aggrieved by the said

dismissal, the plaintiff is before this Court with a submission that the findings recorded by the High Court were tentative and the learned first Appellate Court was required to decide the matter afresh on the evidence available before it.

4. Undisputedly, the High Court had remanded the matter back to the learned first Appellate Court with a positive observation that on the evidence available on record, the suit could not be decreed. Though the earlier appeal was at the instance of the defendant, but, the High Court remanded the matter to the learned first Appellate Court to give an opportunity to the parties to lead evidence. The High Court, instead of dismissing the suit, remanded the matter back to the learned first Appellate Court giving a fresh and further opportunity to the plaintiff to lead further evidence. Despite this order of remand, if the plaintiff failed to produce any further evidence in support of his case, then, the learned first Appellate Court could not travel beyond the findings already recorded by the High Court.

5. The findings of the High Court could be deemed to be tentative if any further evidence was to be brought on the record, but, in case, no further evidence is

brought on the records, then, the findings recorded by the High Court would become final findings.

The learned first Appellate Court was absolutely justified in dismissing the appeal.

6. I find that the substantial question of law is to be answered against the interest of the plaintiff. The appeal is dismissed. No costs.

***[R.S.Garg, J.]***

*kamlesh**